

STATE OF MICHIGAN  
IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and  
Conservator of ANTONIO MORALES,  
a/k/a ANTHONY MORALES,  
a legally incapacitated person,

Plaintiff/Appellant, and  
Cross-Appellee,

v.

AUTO OWNERS INSURANCE COMPANY,  
a Michigan corporation,

Defendant/Appellee, and  
Cross-Appellant.

Supreme Court Docket No. 122601

Court of Appeals Docket No. 233826

Lower Court No. 92-2882-NF  
Hon. Charles D. Corwin

22601 ✓  
**DEFENDANT-APPELLANT AUTO-OWNER INSURANCE COMPANY'S**  
**BRIEF IN OPPOSITION TO PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE**  
**TO APPEAL**

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**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE COURT OF APPEALS PROPERLY REMAND THE CASE FOR A DETERMINATION OF THE PROPER AMOUNT OF PREJUDGMENT INTEREST OWED WHERE THE CURRENT PREJUDGMENT INTEREST STATUTE THAT THE LEGISLATURE HAS DETERMINED IS NOW APPLICABLE TO PLAINTIFF'S CLAIM DOES NOT CONTAIN THE LANGUAGE RELIED UPON BY PLAINTIFF IN HIS APPLICATION FOR LEAVE TO APPEAL?

Defendant/appellee/cross-appellant says "yes."

Plaintiff/appellant/cross-appellee says "no."

The Court of Appeals did not address the amended statute.

- II. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR WHEN IT RULED THAT PREJUDGMENT INTEREST DOES NOT ACCRUE DURING THE TIME THAT THERE IS NO CLAIM PENDING AGAINST A DEFENDANT AND THE CASE IS ON APPEAL?

Defendant/appellee/cross-appellant says "no."

Plaintiff/appellant/cross-appellee says "yes."

The Court of Appeals would say "no."

## **STATEMENT OF MATERIAL FACTS AND PROCEEDINGS**

### **A. Nature of the Proceedings**

This case arises out of a no-fault automobile insurance policy issued by defendant Auto-Owners Insurance Company to plaintiff Antonio Morales pursuant to MCL 500.3101. On December 3, 1991, Antonio Morales was involved in an automobile accident that resulted in severe brain injuries. Auto-Owners denied personal protection benefits to Mr. Morales because his policy had been non-renewed prior to the accident. MCL 500.3113(b).

Plaintiff disputed the effectiveness of the non-renewal notice claiming coverage was in effect. Plaintiff originally purchased a no-fault automobile insurance policy from Auto-Owners on November 27, 1985. Under the terms of the policy, the Company could elect to not renew the policy so long as written notice of nonrenewal was sent not less than 20 days prior to the expiration date. In addition, the policy cancelled automatically if the named insured failed to pay the premium as due. Plaintiff was on a "flex-bill" program which allowed the premium to be paid in monthly installments. (Dkt. #27.)

The automobile insurance policy issued to plaintiff was automatically renewed for nearly six years, although plaintiff frequently paid his monthly installments late. On July 24, 1991, plaintiff was involved in a minor accident, which led defendant to review his driving record and determine that his policy should not be renewed at the end of the current six-month term, expiring on November 27, 1991. A notice on nonrenewal was sent to plaintiff on September 9, 1991 that advised plaintiff that the policy would expire on November 27, 1991, the end of the policy term.

Subsequently, defendant sent two different notices of cancellations for failure to pay installment premium payments when due. Each time, plaintiff corrected the situation by paying the overdue premiums, and defendant sent notices allowing reinstatement. On November 27, 1991, six days before the accident, the nonrenewal took effect pursuant to the nonrenewal notice and coverage expired. The various notices of cancellation for failure to pay premium and the notice of nonrenewal of the policy were summarized by the Michigan Supreme Court in a prior opinion issued in this matter, *Morales v Auto-Owners Ins Co*, 458 Mich 288, 291-293; 582 NW2d 776 (1998).

After plaintiff's accident on December 3, 1991, plaintiff filed suit through his wife, claiming that the plaintiff was unaware that his coverage had expired. Plaintiff asserted that defendant was estopped from nonrenewing the policy, claiming that the various notices created confusion leading plaintiff to believe that he still had coverage at the time of the accident. *Morales* at 293.

## **B. The First Appeal**

On August 1, 1994, the trial court heard cross motions for summary disposition by the parties. In ruling on the motion, the trial court indicated there were three relevant issues: (1) was a notice of non-renewal sent to the plaintiffs; (2) does an intervening cancellation and reinstatement effect the validity of a pre-existing nonrenewal notice, and (3) did the policy terminate at the end of the policy period due to non-payment of premium. In ruling in defendant's favor, the court first indicated that the plaintiff had not shown any valid factual dispute concerning the mailing of the nonrenewal notice. (Dkt. # 39, pp. 20-21.) Second, the court stated that it was compelled by the case of *Slaughter v Smith*, 167 Mich App 400; 421 NW2d 702 (1988) to find that the notice of non-renewal necessitated by the plaintiff's successive

accumulation of points was somehow nullified by subsequent cancellation and reinstatement for non-payment of premium. (Dkt. # 39, pp. 21-22.) Finally, the court ruled that the policy automatically was non-renewed at the end of the policy period when the plaintiff did not pay the required premium to renew the policy, regardless of whether defendant sent notice of non-renewal. (Dkt. # 39, pp. 29-31.)

Plaintiff filed a claim of appeal. (Dkt. #35.) On appeal, the Court of Appeals affirmed in a split unpublished opinion per curiam, issued on September 3, 1996. (Docket No. 178479). The opinion affirmed the dismissal of the case, with the majority agreeing that the policy was not renewed at the end of the policy term. The dissenting judge disagreed, stating that the policy required a nonrenewal notice be sent even if the insured was late in making payments. *Id.* Both parties filed an application for leave to appeal, and leave was granted by the Michigan Supreme Court, 456 Mich 902; 572 NW2d 13 (1997).

On July 28, 1998, this Court issued a split opinion reversing and remanding the case to the trial court. The Court held that because defendant “repeatedly accepted plaintiff’s late payments and continually renewed the plaintiff’s policy,” the principle of equitable estoppel barred defendant from enforcing the automatic nonrenewal provision of the insurance contract. *Morales*, 458 Mich at 295.<sup>1</sup>

On appeal, Auto-Owners had also argued that even if it was barred from enforcing the automatic nonrenewal provision of the contract, it had provided the appropriate notice of nonrenewal to plaintiff in accordance with the policy term. On this issue, the Supreme Court held:

However, just as in *Mooney*, we believe questions of fact exist whether plaintiff reasonably relied on the reinstatement notice in not seeking insurance coverage elsewhere. The series of notices of nonrenewal, cancellation, and renewal allows

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<sup>1</sup> Justice Taylor dissented, noting that the “majority exemplifies in marked degree that hard cases make bad law.” *Morales*, 458 Mich at 305.

plaintiff to argue that defendant is estopped from arguing that it properly notified plaintiff of nonrenewal under the terms of the policy. Plaintiff has alleged facts sufficient to prevent summary disposition in favor of defendant on this issue; however, plaintiff must still prove his case for estoppel before the trier of fact.

*Morales*, 458 Mich at 304. Auto-Owners' motion for rehearing was denied on September 10, 1998, and the case remanded to the trial court.

**C. The Proceedings Upon Remand**

After the case was remanded, defendant stipulated that the medical expenses incurred by plaintiff were reasonable and that the services were reasonably necessary through responses to requests to admit. (Dkt. #89.) As a result, the case was submitted to the jury on the sole question of whether coverage was in effect at the time of the accident based on the estoppel theory asserted by the plaintiff in response to defendant's notice of nonrenewal. The jury returned a verdict in plaintiff's favor on February 24, 2000, finding that defendant was estopped to deny coverage under the policy. (Dkt. # 148.) Defendant's motion for judgment notwithstanding the verdict and/or new trial was denied. (Dkt. # 177.)

On or about May 25, 2000, plaintiff filed a motion for partial summary disposition, asserting that it was entitled to "no-fault penalty interest" pursuant to MCL 500.3142. (Dkt. # 166.) In its motion, plaintiff argued that no-fault penalty interest was recoverable, and runs from 30 days after each invoice for medical care is submitted to the insurer. Plaintiff also argued that he was entitled to attorney fees pursuant to MCL 500.3148, contending that Auto-Owners' refusal to pay no-fault penalty interest was not reasonable. *Id.*

On June 9, 2000, Auto-Owners filed its response to the motion for partial summary disposition arguing penalty interest was inappropriate in this case because benefits were not "due" until the jury found that a policy was in effect on the basis of equitable estoppel. Until the jury made that finding of fact, Auto-Owners argued that it did not have "reasonable proof of the

fact and amount of the loss” as required by MCL 500.3142. (Dkt. # 181.) Defendant’s response also noted that plaintiff never raised the issue of no-fault penalty interest at trial and therefore, the jury was never asked to decide whether the benefits were overdue. Further, the defendant cited a number of cases for the proposition that the purpose of no-fault penalty interest is to penalize an insurer that is recalcitrant in refusing to pay benefits. Because there was no policy in effect at the time of the accident, and such a policy was imposed only by virtue of estoppel, defendant argued that plaintiff was not entitled to no-fault penalty interest, and that penalty interest would begin to run thirty days after the jury verdict was reduced to judgment. Defendant also denied that plaintiff was entitled to attorney fees under §3148, as the issue was reasonably in dispute. *Id.*

On July 12, 2000, the trial court entered an Order for Partial Summary Disposition as to No-Fault Penalty Interest, holding that Auto-Owners was required to pay plaintiff no-fault penalty interest from the date on which each medical invoice was submitted in an amount to be calculated, and attorney fees for the preparation and argument of the motion for partial summary disposition. The trial court also ordered that prejudgment interest under the Revised Judicature Act should be modified to reflect the revised amount of the Judgment. (Dkt. # 187.)

On September 27, 2000, the trial court entered a Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties. (Dkt. # 195.) At the time of the Judgment, the principal balance of benefits owed, incurred through April 30, 2000, together with prejudgment interest through September 1, 2000 of \$216,519.68, totaled \$998,152.95. The State of Michigan, who had appeared as an intervening party as a result of a lien for benefits paid, sought reimbursement of benefits in the amount of \$98,970.82. As a result, the Judgment provided for payment of principal benefits and prejudgment interest in the total amount of \$1,097,123.77.

The Judgment also ordered Auto-Owners to pay no-fault penalty attorney fees in the amount of \$2,540.00, and no-fault penalty interest in an amount to be determined. The Judgment stated that it was a final judgment disposing of all claims and adjudicating all the rights and liabilities of all the parties. (Dkt. # 195.) Auto-Owners paid plaintiff the \$1,097,123.77 reflected in the Judgment on September 5, 2000.

On October 17, 2000, Auto-Owners filed a Claim of Appeal arising from the September 27, 2000 Judgment. On November 8, 2000, this Court dismissed the appeal, holding that the Judgment was not a final judgment because it did not determine the amount of no-fault penalty interest was owed. The case returned to the lower court.

On December 29, 2000, defendant filed (i) a Supplemental Brief in Support of a Motion that the Court Find No-Fault Penalty Interest is Not Due Prior to the Jury Verdict, and (ii) a Motion for Relief from Judgment on Prejudgment Interest Entered on September 27, 2000 Pursuant to MCR 2.612(A) and (C). In the Supplemental Brief, defendant sought entry of a final order with respect to no-fault penalty interest so that issue could be pursued on appeal, and reiterated its position that the trial court improperly awarded no-fault penalty interest based on the facts of the case. In its Motion, defendant sought a determination from the trial court that prejudgment interest was not due and owing for the time period the case was appeal, i.e., from August 1, 1994 to July 28, 1998. (Dkt. # 204 and 205.) Defendant filed a supplemental brief on January 31, 2001. (Dkt. #208.) Plaintiff opposed the motion, arguing that it was entitled to no-fault penalty interest and arguing that it was entitled to prejudgment interest for the entire four years the case was on appeal. (Dkt. # 209 and 210.) The motion was heard on February 26, 2001. At the motion, the trial court ruled from the bench. In its ruling, the trial court held that plaintiff was entitled to no-fault penalty interest from the date of submission of each claim. (Dkt.

# 214, p. 26.) With respect to defendant's request for relief from prejudgment interest, the trial court held that prejudgment interest was appropriate for the entire length of the case, including the time when the case was on appeal. (Dkt. # 214, pp. 27-28.)<sup>2</sup>

An Order was entered on March 26, 2001. (Dkt. # 216.) A revised Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties was entered by the Court on March 26, 2001. (Dkt. # 217.) An appeal to the Court of Appeals followed.

**D. The Decision of the Court of Appeals**

The Court of Appeals, in an unpublished decision issued October 4, 2002, affirmed in part, reversed in part, and remanded. In its opinion, the Court of Appeals affirmed the trial court's conclusion that penalty interest under MCL 500.3142 was due, holding that Auto-Owners' interpretation of the statute was not supported by the language of that statute. *Id* at p 2. The Court of Appeals reversed the trial court's award of prejudgment interest, holding that prejudgment interest does not continue to accrue during the appellate process, citing *Dedes v Asch*, 233 Mich App 329, 340; 590 NW2d 605 (1998), *lv den*, 463 Mich 980; 624 NW2d 186 (2001). The Court of Appeals remanded for a redetermination of the amount of prejudgment interest for which Auto-Owners is liable. *Id* at p 3.

Following the Court of Appeals' decision, Plaintiff-Appellee filed an Application for Leave to Appeal with this Court, seeking reversal of the portion of the Court of Appeals' decision holding that prejudgment interest does not accrue during the appellate process. Contemporaneous with the filing of this Brief opposing Plaintiff's Application for Leave to Appeal, Auto-Owners is filing a Cross-Application for Leave to Appeal with respect to the trial court's award of no-fault penalty interest pursuant to MCL 500.3142.

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<sup>2</sup> The trial court also noted that the motion to amend the judgment was timely made, a finding that was not appealed by plaintiff. (Dkt. #214, p. 216.)

## ARGUMENT

### **I. THE COURT OF APPEALS CORRECTLY HELD THAT PREJUDGMENT INTEREST IS DISALLOWED FOR PERIODS WHEN A CASE IS ON APPEAL.**

#### **A. The Statute Relied Upon By Plaintiff In His Application For Leave To Appeal No Longer Applies To This Case.**

Plaintiff's entire argument is premised on the notion that MCL 600.6013(5) applies to this case. It does not. Although plaintiff provides no citation for his position that this case is governed by § 6013(5), in the court below, plaintiff relied on the Supreme Court's decision in *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998). In that case, this Court held that an insurance policy was a written instrument that did not specify a rate of interest. As a result, the Court held that § 6013(5) applied to disputes involving insurance policies. *Id* at 345-346.

The Revised Judicature Act was amended after the *Yaldo* decision, and after the trial court's decision here, to take insurance contracts out of the scope of §6013(5). Specifically, § 6013(6) was amended effective March 1, 2002 to state as follows:

For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

Subsection (8) now provides:

Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1897, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is

calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

MCL 600.6013(8).

Plaintiff's Complaint was filed on December 1, 1991. (Dkt. #1.) He did not have a final, nonappealable judgment by July 2, 2002. As a result, his claim for interest is now governed by subsections (6) and (8) – sections that do not contain the language relied on by plaintiff throughout his brief.<sup>3</sup> Because the Legislature made it clear in the amendment that it applies to any case that does not have a “final, nonappealable judgment by July 2, 2002,” it is clear that the Legislature intended to have the statute apply retroactively to cases such as this one. *See e.g., Ballog v Knight Newspapers*, 381 Mich 527, 541-42; 164 NW2d 19 (1969)(holding that an amendment to §6013 would operate retrospectively when the Legislature so provided). *See also, Young v Michigan*, 171 Mich App 72, 77-78; 429 NW2d 642 (1988), *lv den*, 432 Mich 915 (1989) (holding that amendments to remedial statutes, like the RJA, apply retrospectively); and *Leger v Image Data Services*, unreported opinion per curiam of the Court of Appeals decided July 5, 2002 (Docket No 221615), 2002 WL 1463555 (Ex. 1)(holding that on remand, the amended interest statute applied).

Section 6013(6) does not contain the language relied on by plaintiff. Unlike §6013(5), it does not state that interest runs from the date of filing the complaint “to the date of satisfaction of judgment.” The statute is silent on whether interest continues to accrue during the time period a case is on appeal if no claim is pending against a defendant (*i.e.*, the situation here). Therefore, the result reached by the Court of Appeals was the correct one, even if this Court accepts

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<sup>3</sup> Plaintiff's Application does reference an amendment of § 6013(5), but not the amendment to §§ 6013(6) and (8). (Plaintiff's Application, p 2, n1.)

plaintiff's argument that §6013(5) is "clear" and "unambiguous" that interest continues to accrue even during the appellate process. This alone justifies not granting leave to appeal in this case, where the result reached by the Court of Appeals is correct. *Fout v Dietz*, 401 Mich 403, 407; 258 NW2d 53 (1977).

**B. Long-Standing Precedent Supports The Court of Appeals' Conclusion That Prejudgment Interest Was Not Payable During The Time Period When Plaintiff's Case Was Dismissed, and Plaintiff Pursued His Appeal.**

Even if §6013(5) is applied to this case, notwithstanding the amendment to §6013, the result reached by the Court of Appeals is still correct. The trial court found that prejudgment interest was recoverable for the time period between the date when the trial court originally granted defendant's motion for summary disposition, August 1, 1994, to the date when the Supreme Court issued its decision on July 28, 1998, remanding the case for trial. During this entire time period of approximately four years, the case was dismissed and there was no claim against Auto-Owners that was viable. Auto-Owners submitted a calculation to the trial court demonstrating that prejudgment interest on the no-fault benefits during this four-year time period amounted to \$216,519.68 of the judgment of \$1,097,123.77. (Dkt. # 205, Exhibit B.)<sup>4</sup> This calculation was not contested by plaintiff, although plaintiff asserted he was entitled to prejudgment interest during the time the case was on appeal. (Dkt. # 209 and 210.)

In addition to seeking prejudgment interest on the principal benefits owed, plaintiff also requested prejudgment interest on the \$278,092.69 awarded for no-fault penalty interest. The trial court awarded prejudgment interest on the no-fault penalty interest, further increasing the

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<sup>4</sup> This entire amount was paid by Auto-Owners on September 5, 2000. Thus, Auto-Owners' December 29, 2000 Motion sought an offset or recoupment of the prejudgment interest paid to plaintiff for the time the case was on appeal.

prejudgment interest award by another \$260,229.62 through September, 2000. Prejudgment interest on the no-fault penalty interest was not disallowed for the time when the case was on appeal. (Dkt. # 216.) In total, prejudgment interest that accrued during the appellate time period amounted to \$476,749.30 of the Revised Judgment entered against defendant.

The Court of Appeals properly held that the trial court erred by awarding prejudgment interest for the time period of August 1, 1994 to July 28, 1998, while the case was pending on the first appeal, and by awarding prejudgment interest on the penalty interest for this same time period.

Statutory interest pursuant to MCL 600.6013 is intended to compensate a party for delay in receiving damages following the filing of a complaint. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999). While the imposition of prejudgment interest is mandatory, a court may disallow prejudgment interest in certain circumstances. The Court of Appeals addressed this issue in *Phinney v Permuter*, 222 Mich App 514; 564 NW2d 532 (1997), where it stated as follows:

When courts construe statutory meaning, their primary goal is to ascertain and give effect to legislative intent. *IBLP Watersmeet Two (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). Here, the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing suits for money damages and for any delay in receiving such damages. *Hadfield*, supra, p 356; *Paulitch v Detroit Edison Co*, 208 Mich App 656, 663 n2; 528 NW2d 200 (1995). *A majority of the Michigan Supreme Court concurred with Justice Riley's opinion that this statutory purpose is not furthered by allowing interest for periods during which no claim existed against the defendant.* *Rittenhouse v Erhart*, 424 Mich 166, 218; 380 NW2d 440 (1985)(Riley, J.). Similarly, a defendant must pay prejudgment interest only from the "date of delay." *Beach*, supra, pp 624-625. *A court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor.* *Eley v Turner*, 193 Mich App 244, 247; 483 NW2d 421 (1992).

*Phinney*, 222 Mich App at 540-541 (emphasis added).<sup>5</sup> This principle from *Phinney* dates back to *Rittenhouse v Erhart*, 424 Mich 166; 380 NW2d 440 (1985), where Justice Ryan noted that it “strains credulity” to believe the “Legislature intended plaintiffs to be compensated during periods for which no disputed claim existed.” After *Rittenhouse*, Section 6013 was amended in 1986, 1987 and 1993. Even though the *Rittenhouse* case and the other cases cited by *Phinney* were on the books, the Legislature made no effort to address these cases in the amendments. Since the Legislature is presumed to act with knowledge of how the courts interpret statutes it has drafted, it must be presumed that the Legislature saw no reason to overrule the *Rittenhouse* case and its progeny. *Magreta v Ambassador Steel Co*, 380 Mich 513, 520; 158 NW2d 473 (1968)(silence of legislature to court’s interpretation can only be construed as consent to the accuracy of the interpretation); *Karpinsky v Saint John Hospital-Macomb Center Corp*, 238 Mich App 539, 545; 606 NW2d 45 (1999)(same).

The four year wait while the case was pending on appeal the first time is not attributable to Auto-Owners. Auto-Owners prevailed in the trial court when the court upheld the policy language and concluded the policy nonrenewed on November 27, 1991. It was plaintiff who filed the appeal, not Auto-Owners. It was plaintiff who sought review by the Supreme Court after the Court of Appeals affirmed the trial court’s decision. The Supreme Court concluded that the doctrine of equitable estoppel could apply in this case and remanded it for trial on factual issues (still not ruling against Auto-Owners as a matter of law). None of the time this case spent on appeal was attributable to Auto-Owners. Auto-Owners has no control over the speed at which appeals proceed, and should not be penalized by the imposition of prejudgment interest during

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<sup>5</sup> The *Phinney* decision was recently cited by the Supreme Court with approval in another case involving the applicability of the prejudgment interest statute. *People v \$176,598.00 United States Currency*, 467 Mich 382, 386, n9; 633 NW2d 367 (2001).

the time plaintiff's appeal wound its way through the appellate courts. The Court of Appeals so held under very similar circumstances:

Here, we find that *the fault for the delay was not attributable to defendants. This case concerned at least one issue of such significance that our Supreme Court agreed to rule on it following an application for leave to appeal sought by the plaintiffs. To allow interest to continue to accrue during an appellate process would hinder parties from asserting new and innovative arguments in the trial court for fear that interest will continue to accrue on a claim that may be reversed during the appeal process. Therefore, because the fault for the delay is not properly attributable to defendants, the trial court erred in granting prejudgment interest for the period that the matter was on appeal.* We remand to the trial court for it to recalculate interest from the time of the filing of the complaint until the judgment is satisfied, abating the interest for the period that the matter was on appeal.

*Dedes, supra*, 233 Mich App at 340 (emphasis added).

The *Dedes* decision was reiterated in *People v \$176,598.00 United States Currency*, 242 Mich App 342; 618 NW2d 922 (2000), *aff'd*, 467 Mich 382; 633 NW2d 367 (2001). In *United States Currency*, a claimant's assets were seized by Detroit police officers pursuant to the controlled substance forfeiture statute, MCL 333.7521. The assets were eventually returned to the claimant after the appellate court found that the search and seizure was illegal. The claimant then filed a motion for prejudgment interest on the judgment ordering the return of the seized funds. In rejecting the claim for prejudgment interest, the Court of Appeals stated:

Finally, the city contends that the delay in the return of the currency to claimant was attributable in large measure to the claims made by the United States government and the state of Michigan. A court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor. *Phinney, supra*. In addition, this Court has held that prejudgment interest does not continue to accrue during the appellate process. *See Dedes v Asch*, 233 Mich App 329, 340; 590 NW2d 605 (1998). We therefore remand to the trial court so that it can determine how much of the delay in resolving these proceedings may properly be attributed to the city and calculate the interest accordingly.

*United States Currency*, 242 Mich App at 348 (emphasis added). *See also, Copeland v Michigan*, unreported opinion per curiam of the Court of Appeals decided March 9, 2001, 2001

WL 716795, *lv den*, 636 NW2d 141 (2001) (Ex. 2)(disallowing prejudgment interest in a no-fault case where the court found the case did not present a situation where the insurer “was delaying litigation solely to extend the time at which to pay.”)

In its decision from the bench on this issue, the trial court noted the *Dedes* and *United States Currency* cases, but refused to apply them, stating that he thought such a holding opened a “pandora’s box” because insurance companies would be inclined to appeal everything. (Dkt. # 213, pp. 28-28.) This ruling was contrary to controlling precedent, which was binding on the trial court. *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405, *appeal dism’d*, 568 NW2d 682 (1997)( “[p]ublication of an opinion of this Court creates binding precedent statewide, and ... the opinion remains binding ‘until such time as a decision of the Supreme Court enters altering the lower court decision or questioning its rationale.’”).<sup>6</sup> The trial court committed clear error by ignoring it, and failing to disallow interest during the time the case was on appeal. The Court of Appeals properly reversed on this basis.

Furthermore, the ruling of the trial court made no sense in the context of this case, where it was plaintiff, not the insurer, who filed the first appeal. The insurance company was the party who received a favorable summary disposition order in the first instance. The trial court’s refusal to following binding precedent penalizes Auto-Owners for the time period when plaintiff pursued its appeal. Plaintiff has already been rewarded for pursuing that appeal through the decision of the Supreme Court and the subsequent jury verdict. Auto-Owners paid over \$750,000 in no-fault benefits thereafter. If the trial court and the Court of Appeals erred in the

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<sup>6</sup> The trial court stated that he was entitled to ignore the precedent on the basis that *United States Currency* was quoting “dicta” from *Dedes*. (Dkt. # 213, p. 29.) The *Dedes* court’s resolution of the question of prejudgment interest was not mere “dicta,” it was part of the court’s ruling in the case. Even if the court were correct that the holding was “dicta” in *Dedes*, however, that does not excuse the trial court’s failure to follow the clear holding of *United States Currency*, where no such argument can be made.

first appeal by upholding the dismissal of the case, Auto-Owners should not be further penalized for that error. This is particularly true here, where the trial court awarded no-fault penalty interest for the same time period, and then slapped prejudgment interest on top, resulting in an effective interest rate on the judgment exceeding 20%. In total, the penalty interest and the prejudgment interest added approximately \$750,000 to the total judgment. The awards are punitive in nature, inconsistent with the underlying purpose of the prejudgment interest statute.

In his Application, plaintiff attempts to distinguish *Dedes* on two basis. First, he argues that *Dedes* was subject to § 6013(6), rather than § 6013(5), and was thus based on statutory language that was “arguably ambiguous.” (Plaintiff’s Application, pp 4-5.) Because the statute has now been amended to make §6013(6) applicable to this case, the distinction plaintiff attempts to make no longer exists, and the statutory language plaintiff concedes is “arguably ambiguous” applies here.

Second, plaintiff argues that *Dedes* was based on a finding that the fault of the delay was not attributable to defendants, and claims that the same is not true here. (Application, p 5.) Like *Dedes*, this case involves an issue of such significance that the Supreme Court has previously agreed to rule on it following an application for leave to appeal. There is nothing in the record to support a conclusion that Auto-Owners delayed the first appeal (or the second appeal). The two cases are indistinguishable on these facts.

**C. Because The Judgment Was Based on Principles Of Equitable Estoppel, The Award Of Prejudgment Interest Is Discretionary.**

When the case is based on equity, award of prejudgment interest is discretionary. *Saber v Saber*, 146 Mich App 108, 110; 379 NW2d 478 (1985). That discretion should not be exercised on the facts presented here. The contract providing for benefits is only in effect as a result of the application of estoppel. Otherwise, the contract would have been nonrenewed, and not in effect

at the time of the accident. It is an appropriate case for the exercise of the court's discretion to determine that prejudgment interest is not recoverable in this unique case.

**II. THE COURT OF APPEALS DID NOT ERROR BY NOT EXPRESSLY RULING ON PLAINTIFF'S DETRIMENTAL RELIANCE ARGUMENT BECAUSE THAT ISSUE WAS NOT RAISED BEFORE THE LOWER COURT, AND EVEN IF THE ARGUMENT HAD BEEN PRESERVED, IT FAILS BECAUSE PLAINTIFF CANNOT ESTABLISH THAT HE DETRIMENTALLY RELIED ON A NON-FINAL ORDER AS A MATTER OF LAW.**

Plaintiff's request to the Court of Appeals that the case be remanded for a determination of whether he detrimentally relied on defendant's payment was not raised in the trial court. As a result, the argument could not be raised for the first time on appeal. *See, Norton Shores v Carr*, 81 Mich App 715; 265 NW2d 802 (1978); *Harvey v Aetna Life Ins Co*, 72 Mich App 285; 252 NW2d 471 (1976); *Furstenberg Bros v Township of Carrollton*, 61 Mich App 230; 232 NW2d 372 (1975).<sup>7</sup> Therefore, the Court of Appeals did not error when it did not expressly address this issue in its Opinion.

Moreover, even if the argument had been preserved properly, it fails as a matter of law. Plaintiff argues that he "detrimentally relied" on defendant's payment and that as a result, no recoupment of the payment can be made. The order granting plaintiff the payment in the amount of \$998,152.95 was not a final order. Therefore, if plaintiff disbursed the funds before the final judgment was entered, it did so at its own risk that the decision would be changed and his reliance cannot be "reasonable" as a matter of law. A court is free to change its decision in the case up to the point where a final judgment is entered. MCR 2.604(A); *Grettenberger Pharmacy, Inc v Blue Cross-Blue Shield of Michigan*, 98 Mich App 1; 296 NW2d 589 (1980) ("It

<sup>7</sup> In the lower court, plaintiff argued only that the matter should be decided by the bankruptcy court, not that the circuit court or bankruptcy court should decide the issue of detrimental reliance.

is clear that absent a final judgment, an order or other form of decision is subject to revision before entry of final judgment.”)<sup>8</sup>

Finally, even if plaintiff’s “detrimental reliance” argument is accepted, it pertains only to the prejudgment interest awarded on the claim for the payment of no-fault benefits that was part of the original order (*i.e.*, \$278,092.69 of the \$476,749.30 in prejudgment interest awarded to plaintiff). The argument has no applicability to the additional \$260,229.62 in prejudgment interest awarded by the trial court on top of the no-fault penalty interest award, that has not been paid or distributed. Furthermore, if the decision of the Court of Appeals stands, Auto-Owners can simply offset the overpayment of the prejudgment interest against the no-fault penalty interest that has not yet been paid, resulting in a net payment to the plaintiff – not a net amount owed by plaintiff to Auto-Owners.

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<sup>8</sup> In *Wilson v Newman*, 463 Mich 435; 617 NW2d 318 (2000), the court considered mistaken payment in response to a writ of garnishment. The case did not involve a situation like that presented here, where the final judgment was not yet entered.

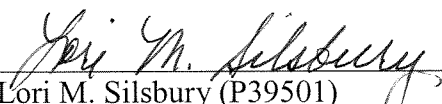
**RELIEF REQUESTED**

Defendant requests that the Court deny plaintiff's Application for Leave to Appeal with respect to the issue of prejudgment interest, and instead grant defendant's Cross-Application for Leave to Appeal, filed contemporaneously with this brief.

Respectfully submitted by,

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Dated: November 18, 2002

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UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Michigan.

**Gene LEGER, Plaintiff/Counterdefendant-  
Appellant/Cross-Appellee,**

**v.**

**IMAGE DATA SERVICES, David A. Wilutis,  
Defendants/Counterplaintiffs-  
Appellees/Cross-Appellants  
and**

**David OISTAD, Defendant-Counterplaintiff.**

**No. 221615.**

July 5, 2002.

Before: FITZGERALD, P.J., and BANDSTRA  
and K.F. KELLY, JJ.

UNPUBLISHED

PER CURIAM.

\*1 In this contract action, plaintiff appeals as of right from the trial court's orders entering judgment in favor of plaintiff following a jury trial, but denying plaintiff's motion for a new trial as to damages or, in the alternative, additur. Defendant [FN1] cross appeals, challenging the trial court's orders denying his motions for summary disposition and a directed verdict. We affirm in part, reverse in part, and remand for further proceedings.

FN1. The record indicates that defendant David Oistad was dismissed from this case before trial, after the trial court dismissed plaintiff's claim for interference with contract, a decision which is not at issue in this appeal. For that reason, and because the remaining defendants are David Wilutis and the corporation he controls, this opinion employs the singular term "defendant" to refer exclusively to Wilutis, as we see little need to distinguish between these remaining defendants for purposes of this appeal.

Defendant owned and operated Image Data Services (IDS), a corporation engaged in the business of providing companies with data storage and retrieval services. Plaintiff began working for defendant as a

salesperson, earning both a salary and commissions, in 1990. In time, however, relations between the two became strained and, in early 1995, defendant terminated plaintiff's employment. Defendant provided a severance package, but refused to pay plaintiff commissions on any sales that occurred after his term of employment, without regard to plaintiff's role in procuring those sales. Plaintiff filed suit, alleging breach of express and implied contracts, as well as conversion. [FN2] The jury found for plaintiff on the contract claims and awarded damages of \$18,441.45, exclusive of costs and interest. Although the jury also concluded that defendant's actions constituted a conversion of plaintiff's property, no separate damages were awarded under that theory.

FN2. Defendant counterclaimed, but the trial court dismissed each of those claims, and that decision is not challenged within this appeal.

I. Procuring Cause  
A. Applicability

In support of his claim for post-termination commissions, plaintiff relied on the doctrine of "procuring cause." Therefore, we first address defendant's principal argument on cross-appeal, i.e., that the trial court erred in denying his motions for summary disposition and directed verdict asserted on the ground that the procuring-cause doctrine did not apply in this case. The applicability of a legal doctrine is a question of law that is reviewed de novo. *James v. Alberts*, 464 Mich. 12, 14; 626 NW2d 158 (2001).

Black's Law Dictionary defines "procuring cause" as "the cause originating a series of events, which, without a break in their continuity, result in the accomplishment of the prime object." Black's Law Dictionary (6th ed, 1990), p 1208. With respect to the sale of real estate, "[a] broker will be regarded as the 'procuring cause' of a sale, so as to be entitled to commission, if his or her efforts are the foundation on which the negotiations resulting in a sale are begun." *Id.* Despite the obvious value of the doctrine as concerns real estate, the doctrine is equally applicable to other areas of sales. See *Reed v. Kurdziel*, 352 Mich. 287; 89 NW2d 479 (1958) (concerning sales of foundry supplies). Indeed, the doctrine exists for the purpose of "preventing a principal from unfairly taking the benefit of [an]

agent's ... services without compensation and imposing upon the principal ... liability ... for commissions for sales upon which the agent ... was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent." *Id.* at 294.

\*2 Application of the doctrine requires examination of the relationship between the principal and the agent:

"The relationship between agent or broker and principal being a contractual one, it is immediately apparent that whether an agent or broker employed to sell personalty on commission is entitled to commissions on sales made or consummated by his principal or by another agent depends upon the intention of the parties and the interpretation of the contract of employment, and that, as in other cases involving interpretation, all the circumstances must be considered." [*Id.*, quoting with approval 12 ALR2d 1360, 1363.]

Thus, the procuring-cause doctrine is but a subset of contract law, acting as a default rule for interpreting a contract that is silent regarding the intent of the parties with respect to commissions on sales generated by a salesperson before, but consummated after, termination of the relationship between the salesperson and the principal. Because applicability of the doctrine is a function of the agreement between the parties, one who procures a customer is not automatically entitled to perpetual commissions from all sales to the customer procured. Instead, the doctrine establishes a basis upon which a terminated employee may lay claim to certain commissions on sales that the employee caused to happen, but that were consummated by others after the employee was terminated. See *Butterfield v. Metal Flow Corp.*, 185 Mich.App 630, 635-636; 462 NW2d 815 (1990), citing *Reed*, *supra* at 293-295.

Here, the parties agree that the written agreements between them were silent on the question of post-termination commissions. Plaintiff, however, testified that in some instances he worked long and hard to land certain large accounts in anticipation of receiving commissions on the resulting sales, whether or not those sales occurred after his term of employment. Defendant testified, on the other hand, that he had never envisioned paying post-termination commissions, that the parties never discussed such a thing before the present litigation, and that plaintiff's

base salary was intended to compensate plaintiff for his efforts in bringing new customers to the table.

Generally, "oral evidence of prior or contemporaneous understandings is inadmissible to vary or contradict an unambiguous writing which is intended to memorialize the complete agreement between the parties." *Roberts Associates, Inc v. Blazer Int'l Corp.*, 741 F Supp 650, 654 (ED Mich, 1990), citing *NAG Enterprises, Inc v. All State Industries, Inc.*, 407 Mich. 407, 409; 285 NW2d 770 (1979). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v. Fowler*, 190 Mich.App 253, 258; 475 NW2d 458 (1991). Moreover, to ascertain such intent, the various parts of a contract should be read together. See, e.g., *First Baptist Church v. Solner*, 341 Mich. 209, 215; 67 NW2d 252 (1954), and *JAM Corp v. AARO Disposal, Inc.*, 461 Mich. 161, 170; 600 NW2d 617 (1999).

\*3 Here, the employment agreement between the parties unambiguously provides for at-will employment, and affords defendant great flexibility in deciding how to compensate plaintiff. The agreement additionally declares that its four corners constitute the entire agreement of the parties, and that the contract may not be changed orally, "but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought."

The separate compensation agreement, executed on the same day as the employment contract, provides that plaintiff will receive "A 7% COMMISSION ON ALL ACCOUNTS SOLD BY EMPLOYEE ... BASED ON 7% OF NET INVOICE OF CUSTOMERS [sic] BILLINGS." (Capitalization in original). The agreement additionally provides plaintiff with a base salary of \$22,500, which was to decrease to \$18,000 after six months, in obvious contemplation that commissions would account for an increasingly greater portion of plaintiff's income. [FN3]

FN3. The evidence, however, indicates that plaintiff's salary was never reduced in accordance with this provision.

A subsequent compensation plan, signed in May 1994, provides for a salary of \$25,500, and

specifies that plaintiff would receive varying percentages for work done "inhouse," for work "out-sourced" to other companies, and for equipment sales. The plan further includes a provision for commissions calculated from the "Net invoice" on "selected Michigan House Accounts," and sets forth specific provisions stemming from certain customers, including the City of Toledo. This latter agreement further provides, however, that IDS would retain the right to modify the compensation plan at any time.

Neither compensation plan expressly provides for any bonus for bringing in an account, or any perpetual entitlement to commissions regardless of who is responsible for generating continuing sales. The closest that any contractual language comes to suggesting that commissions are owed to plaintiff simply from his having brought the customer to the table in the first place, is the provision in the first compensation agreement indicating that plaintiff would receive a percentage "ON ALL ACCOUNTS SOLD BY EMPLOYEE." (Capitalization in original). Still, it would be a strained reading of this language to conclude it to mean "all future sales to any customer originally procured by employee." We think it more reasonable to regard this language as indicating that commissions were to be paid on sales *specifically generated by the salesperson*.

In the May 1994 compensation agreement, both the provisions for commissions on house accounts, as well as those concerning accounts plaintiff himself procured, are tied to continuing production or sales. This suggests that there is no unstated distinction between the terms under which plaintiff was entitled to commissions for sales generated from accounts that he serviced, but did not procure, and those that plaintiff initially brought into the business relationship with defendant. In other words, the wording of these provisions envisions commissions paid on continuing sales as they are generated, not as a prize for bringing the customers to IDS in the first place. Just as it would be peculiar to read the provision for commissions on house accounts as stemming from anything other than plaintiff's continuing involvement with those accounts, it would be peculiar to read the provisions for commissions on other accounts and sales as guaranteeing plaintiff a perpetual claim on commissions on those continuing sales regardless of who is responsible for generating the additional

patronage. Thus, under the terms of the May 1994 compensation plan, plaintiff's accounts became house accounts when plaintiff ceased his active involvement with them on defendant's behalf.

\*4 It is apparent that in this kind of work, sales and service often merge. Once an account is procured, it does not remain static as first brought in, but instead, the specific services and volumes of business will change over time. Initial procurement is but one objective of the salesperson; servicing the account--which will typically involve additional sales work--is another. Not only might an existing account, through the efforts of the salesperson servicing the account, come to include new services or increased volumes of business not on the table with the initial procurement of the account, but simply retaining an account under the original terms will itself often involve a significant measure of continuing salesmanship.

The written agreements between the parties in this case do not clearly indicate that plaintiff was to receive no commissions on any further sales as of the moment of termination (or, even further, sales that were generated primarily by plaintiff while still working for defendant). Thus, the procuring- cause doctrine applies to this case at least insofar as the doctrine bars such an interpretation of those agreements. What then remains is the simple question whether defendant compensated plaintiff fully for sales for which plaintiff, both during and presumably shortly after his term of employment, was in fact responsible. In that regard, the evidence in this case shows a dispute concerning at least some of the sales that took place during plaintiff's term of employment, [FN4] and, of course, the parties differ concerning the extent of plaintiff's responsibility for sales taking place after he was terminated. Because these were factual questions for jury resolution, the trial court properly denied the motions for summary disposition and directed verdict on the procuring-cause issue. *Kitchen v. Kitchen*, 239 Mich.App 190, 193; 607 NW2d 425 (1999); *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich.App 284, 289; 537 NW2d 258 (1995).

FN4. Most notably those to Standard Federal Bank, which mainly involved another salesperson, and over which the parties disagree on the extent of plaintiff's role and entitlement to compensation.

B. Plaintiff's Issues Relating to Procuring Cause

Plaintiff argues that the trial court abused its discretion in instructing the jury not to award future damages, and in denying a post-trial motion for new trial or additur. We disagree in both instances.

The trial court ruled that the evidence did not support a claim of future damages, and so instructed the jury. We agree. Plaintiff's claim of entitlement to future damages rests not so much on the terms of the written compensation agreements as it does on an overly expansive application of the procuring-cause doctrine. As we concluded above, the trial court correctly held that the procuring-cause doctrine was of *limited* applicability to the facts in this case. The court's ruling against future damages was properly in furtherance of that limitation.

Evidence presented at trial established that continuing sales to existing customers was largely a function of continuous "servicing" of those accounts by others currently in defendant's employ. Beyond having simply brought those customers into a business relationship with defendant in the first place, plaintiff has put forth no basis for receiving commissions on such continued efforts for any significant period of time after his active salesmanship for defendant ended. As discussed above, neither the written compensation agreements nor the limited applicability of the procuring-cause doctrine permits such an invasion by plaintiff of future sales. Indeed, the written agreements between the parties emphasized the procurement of sales, not of customers, and set forth an at-will employment relationship in which defendant maintained the right to modify the terms of compensation freely. Accordingly, we find that the court's instruction that the doctrine of procuring cause could establish an entitlement to commissions on post-termination sales only for a "reasonable period" appropriately reflected the evidence and applicable law.

\*5 Nor did the trial court err in denying plaintiff's motions for new trial or additur. Plaintiff argues that he was clearly entitled to damages of \$152,933 (plus future damages), and not just the \$18,441 awarded him by the jury. We agree with the trial court that the jury had a reasonable evidentiary basis for limiting its award as it did.

A trial court has the discretion to grant a new trial

restricted to the issue of damages if it finds that the award of damages was clearly inadequate or against the great weight of the evidence. MCR 2.611(A)(1)(d) and (e). However, appellate courts disfavor such partial new trials because "liability and damage issues are commonly interwoven." *Dooms v. Stewart Bolling & Co*, 68 Mich.App 5, 22-23; 241 NW2d 738 (1976). See also *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich. 485, 489; 129 NW2d 897 (1964) (despite their authorization within the court rules, partial new trials limited to the question of damages are disfavored).

An alternative to new trial in such a case is the device of additur. MCR 2.611(E)(1) provides as follows:

If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

"The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence." *Settingington v. Pontiac General Hospital*, 223 Mich.App 594, 608; 568 NW2d 93 (1997). A jury is free to accept or reject a plaintiff's testimony regarding damages, and need not award any damages even if it finds liability. *Joerger v. Gordon Food Service, Inc*, 224 Mich.App 167, 172-173; 568 NW2d 365 (1997). However, a verdict is inadequate if the jury ignored uncontroverted damages. *Burka v Allied Integrated Diagnostic Services, Inc*, 175 Mich.App 777, 780; 438 NW2d 342 (1989). In this area, a trial court is entitled to considerable deference on appeal; having had the opportunity to evaluate the jury's reaction to the witnesses and other proofs, the trial court stands in the best position to consider the merits of a motion to adjust the jury's award of damages. See *Palenkas v. Beaumont Hospital*, 432 Mich. 527, 533-534; 443 NW2d 354 (1989) (concerning remittitur). [FN5]

FN5. Because remittitur differs from additur only in that the former is a remedy for excessive damages while the latter is a remedy for inadequate damages, the two devices may be regarded as different manifestations of a single judicial

mechanism for correcting erroneous jury awards, as reflected by the simultaneous presentation of both remedies within the court rules, MCR 2.611(E)(1). Thus we have no hesitation in citing a case dealing with remittitur for a principle applicable also to additur.

Plaintiff argues that because the jury found liability under the procuring- cause theory, the jury should have awarded damages reflecting plaintiff's very liberal sense of how that doctrine should apply. However, as discussed above, the doctrine had but limited applicability in this instance, and the trial court tailored the jury's use of that doctrine accordingly. Thus, we do not conclude that the trial court abused its discretion in declining to grant plaintiff's motion for additur or new trial on this ground.

\*6 We similarly reject plaintiff's claim that the documents presented at trial, including defendant's own business records, established uncontroverted damages to which he was entitled, but was not awarded by the jury. Even if plaintiff's figures with respect to damages were not controverted, his legal and factual theories of entitlement--mainly an expansive interpretation of procuring cause--were very much challenged. Moreover, as our conclusions above indicate, plaintiff was obliged to do more than prove that certain customers brought into the business relationship by him conducted specific amounts of business with defendant. Rather, plaintiff was required to prove that he was the specific procuring cause of each sale. Plaintiff, however, has failed to detail his claims in this regard in his brief on appeal, and has thus failed to properly present those issues for this Court's review. See *In re Toler*, 193 Mich.App 474, 477; 484 NW2d 672 (1992) (a party may not merely state a position and leave it to this Court discover and rationalize the basis for the claim). Accordingly, plaintiff is entitled to no relief on this claimed error.

## II. Conversion

Plaintiff sought to prevail on the conversion theory in order to take advantage of the provisions for treble damages, costs, and attorney's fees found in M.C.L. § 600.2919a. The trial court initially reserved judgment on the applicability of this theory and allowed the conversion question to go to the jury. It later concluded that the theory was not

applicable under the facts of this case, and refused to entertain the question of enhancing the judgment pursuant to M.C.L. § 600.2919a. [FN6] We find no error in the trial court's conclusion.

FN6. On cross-appeal, defendants argue that M.C.L. § 600.2919a does not provide a remedy to a victim of conversion against the actual tortfeasor. Because we agree with the trial court that the evidence in this case did not support a finding of conversion, we need not address the statutory question.

In making his case for conversion, plaintiff argues as if to suggest that any time one party is found to have owed another some money following a protracted dispute, the first has converted the amount owed. Such a scenario, however, is far too broad to be encompassed by the tort of conversion. An action for conversion of money cannot be maintained unless there is an obligation on the part of the defendant to "return" specific monies "entrusted" to his care. *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich.App 94, 111; 593 NW2d 595 (1999). Here, plaintiff's position at trial was simply that he had a contractual right to more money than that paid to him by defendant. Thus, even if plaintiff succeeded in proving that defendant was obliged to pay him certain sums in contract damages, plaintiff never suggested, let alone proved, that defendant had any obligation to "return" to plaintiff monies that plaintiff had "entrusted" to defendant's care. This was a contract case, not a tort case, and the trial court properly recognized that distinction.

For this same reason, we find that the court did not abuse its discretion in sustaining an objection to plaintiff's eliciting from defendant information on his income. Plaintiff argues that comparison of defendant's income before and after terminating plaintiff would have revealed that increases in defendant's income closely correlated to amounts that plaintiff insisted were wrongfully withheld from him. However, this reasoning is but an extension of plaintiff's failed attempt to equate money owed with money converted. Because this was not a conversion case, defendant's income--even if it did reflect increases corresponding with amounts plaintiff proved were wrongfully withheld from him-- was not relevant.

### III. Judgment Interest

\*7 Plaintiff argues that the trial court erred in failing to apply the rate of prejudgment interest statutorily prescribed for damages on written instruments. We agree.

At the time of trial, M.C.L. § 600.6013(5) provided in relevant part that:

if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, ....

MCL 600.6013(6), in turn, provided for a lower interest rate:

Except as otherwise provided in subsection (5) ..., interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July and January 1, as certified by the state treasurer, and compounded annually pursuant to this section. Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs.

The prejudgment-interest statute is remedial in nature and therefore must be construed liberally in favor of the prevailing party. *McKelvie v. Auto Club Ins Ass'n*, 203 Mich.App 331, 339; 512 NW2d 74 (1994). Moreover, a "written contract" is a "written instrument" for purposes of applying M.C.L. § 600.6013(5). See *Yaldo v. North Pointe Ins Co*, 457 Mich. 341, 346-347; 578 NW2d 274 (1998).

In response to plaintiff's request for application of the higher rate of interest afforded under M.C.L. § 600.6013(5), the trial court ruled:

[T]his was not a damage on a written instrument because there was an express contract and the jury so found, but the jury also found that that express contract did not address the issue of post-termination commissions. The jury found some other kind of contract for post-termination commissions. Since that is their express finding, I

don't see how I can rule that this was an action successfully brought on a written instrument.

The trial court's characterization of the damages award as stemming from "some other kind of contract" than the written agreements is problematic. As discussed above, the procuring-cause doctrine exists as a contractual default rule to govern the interpretation of certain sales contracts. Operation of the doctrine does not bring into existence an implied contract, but rather, fleshes out an existing contract--in this case, the written employment agreement and the two written compensation agreements.

In light of the imperative to interpret remedial statutes broadly so as to advance the legislative remedy, *Eide v. Kelsey-Hayes Co*, 431 Mich. 26, 34; 427 NW2d 488 (1988), we hold that the damages awarded under the procuring-cause doctrine stemmed, at least in part, from the written contracts. Thus, the interest rate that M.C.L. § 600.6013 provides for judgments on written instruments applies.

\*8 However, because the jury found both express and implied contracts, but awarded damages under both theories without differentiating between them, the trial court must endeavor on remand to parse the award to distinguish between damages stemming from written and implied contracts. The rate of interest provided by M.C.L. § 600.6013 should be applied only to those damages found to stem from the written contracts. [FN7]

FN7. We note that M.C.L. § 600.6013 has been amended since the trial court calculated interest in this matter. On remand, the statute, as amended, should be used for determining the interest applicable to damages stemming from the written contracts.

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

2002 WL 1463555 (Mich.App.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Court of Appeals of Michigan.

**Clifton Conrad COPELAND, Plaintiff-Appellant,**  
v.

**STATE of Michigan, State Farm Mutual  
Automobile Insurance Company, Detroit  
Receiving Hospital, and Rehabilitation Institute,  
d/b/a Detroit Rehabilitation  
Hospital, Defendants-Appellees,  
and  
GARDEN CITY HOSPITAL, Defendant.**

**No. 218144.**

March 9, 2001.

Before: BANDSTRA, C.J., and WILDER and  
COLLINS, JJ.

PER CURIAM.

\*1 Plaintiff appeals as of right from an order of summary disposition requiring defendant State Farm, his no-fault insurer, to pay personal protection insurance benefits directly to defendants State of Michigan, Detroit Receiving Hospital, and Detroit Rehabilitation Hospital. We affirm.

This dispute arises from a 1997 motor vehicle accident in which plaintiff was injured. Defendant hospitals are medical providers that treated plaintiff for his injuries following the accident. After settling the underlying dispute regarding State Farm's liability on plaintiff's no-fault claim in a previous case, State Farm issued checks payable to defendants jointly with plaintiff's attorney. The hospitals declined to negotiate these checks. [FN1] Plaintiff then filed the instant declaratory judgment action, arguing that State Farm should pay no-fault benefits directly to plaintiff so that plaintiff's attorney's lien arising from the previous action could be satisfied. After State Farm moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), plaintiff responded by moving for declaratory judgment. The trial court ordered State Farm to pay personal protection insurance directly to the remaining defendants. [FN2]

FN1. Although the record is not entirely clear on the reason the hospitals did not negotiate the checks, the state is subrogated to plaintiff's entitlement to any right of recovery for the cost of hospitalization and treatment; the person receiving the benefits or a person acting on the person's behalf must sign an assignment of rights for those benefits. MCL 400.106(1)(b)(ii); MSA 16.490(16)(1)(b)(ii). The hospitals could have declined to negotiate the checks on the basis of the assignment of rights.

FN2. The court also ordered that counsel for plaintiff be paid an attorney fee of \$10,000. Plaintiff does not challenge the amount awarded by the court.

Plaintiff first argues that the trial court erred when it ordered State Farm to pay personal protection benefits directly to the State of Michigan and the hospitals. Plaintiff points to M.C.L. § 500.3112; MSA 24.13112, asserting that it limits recovery of personal protection benefits to an injured person. Because the interpretation of a statutory provision presents a question of law, this Court's review is de novo. *Travelers Ins v. U-Haul of Michigan, Inc.*, 235 Mich.App 273, 279; 597 NW2d 235 (1999).

MCL 500.3112; MSA 24.13112 provides:

Personal protection benefits *are payable to or for the benefit of* an injured person, or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:

(a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an

administrator or an executor.

(b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse. [Emphasis supplied.]

\*2 The primary purpose of statutory interpretation is to give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v. Marlette Homes, Inc.*, 456 Mich. 511, 515; 573 NW2d 611 (1998). In determining the Legislature's intent, we look to the language of the statute. *Id.* If the plain and ordinary meaning of a statute is clear, further judicial interpretation is inappropriate. *Travelers Ins, supra* at 279. The Legislature is presumed to have intended the meaning that a statute clearly expresses. *Professional Rehabilitation Associates v State Farm Mut Automobile Ins Co*, 228 Mich.App 167, 172; 577 NW2d 909 (1998).

We conclude that a plain reading of the language, "for the benefit of an injured person," in § 3112 evidences the Legislature's intent that payment of personal protection benefits not be limited to the injured person as long as the payment is made for the benefit of that person. Because the payments made by State Farm to the State of Michigan and the hospitals clearly inured to plaintiff's benefit, the trial court's order was proper.

Plaintiff's reliance on *Hicks v. Citizens Ins Co of America*, 204 Mich.App 142; 514 NW2d 511 (1994), is misplaced. In *Hicks, supra*, this Court concluded that the defendant no-fault insurer was liable for the plaintiff's medical expenses after the state mistakenly paid Medicaid benefits to the plaintiff's medical provider. However, this Court did not address the issue whether such benefits must be paid directly to the plaintiff.

Plaintiff also argues that the trial court should have awarded statutory prejudgment interest pursuant to M.C.L. § 600.6013(5); MSA 27A.6013(5), and penalty interest pursuant to M.C.L. § 500.3142(3); MSA 24.13142(3). We review de novo an award of interest pursuant to M.C.L. § 600.6013; MSA 27A.6013. *Everett v. Nickola*, 234 Mich.App 632, 638; 599 NW2d 732 (1999). We also review de novo an award of interest pursuant to M.C.L. § 500.3142; MSA 27A.13142. *Attard v Citizens Ins Co of America*, 237 Mich.App 311, 319; 602 NW2d 633 (1999).

MCL 600.6013; MSA 27A.6013, which provides for prejudgment interest in civil actions, provides:

(5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

MCL 500.3142; MSA 24.13142, governing penalty interest on no-fault claims, states:

(1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

\*3 (3) An overdue payment bears simple interest at the rate of 12% per annum.

Statutory interest pursuant to M.C.L. § 600.6013; MSA 27A.6013 is intended to compensate a party for delay in receiving damages following the filing of a complaint. *Attard, supra* at 319; *Hadfield v. Oakland Co Drain Comm'r*, 218 Mich.App 351, 356; 554 NW2d 43 (1996). Our Supreme Court has held that an insurance policy is a "written instrument" within the meaning of § 6013. *Yaldo v. North Pointe Ins Co*, 457 Mich. 341, 346; 578 NW2d 274 (1998).

The imposition of prejudgment interest pursuant to M.C.L. § 600.6013, M.S.A. § 27A.6013 is

mandatory. *Phinney v. Perlmutter*, 222 Mich.App 513, 540; 564 NW2d 532 (1997). A plaintiff is entitled to prejudgment interest even if the trial court did not specifically include it in its order. *Dept of Treasury v Central Wayne Co Sanitation Authority*, 186 Mich.App 58, 64; 463 NW2d 120 (1990). The prejudgment interest statute is to be construed liberally in favor of the plaintiff. *McKelvie v. Auto Club Ins Ass'n*, 203 Mich.App 331, 339; 512 NW2d 74 (1994). However, a court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor. *Eley v. Turner*, 193 Mich.App 244, 247; 483 NW2d 421 (1992); *Phinney, supra* at 541.

We conclude that the delay in providing no-fault benefits in this case was not attributable to State Farm. The record indicates that State Farm attempted to compensate the State of Michigan, and the hospitals by paying plaintiff's no-fault benefits; however, checks issued by State Farm payable jointly to plaintiff's attorney and his medical providers were not negotiated by the hospitals. The facts of the present case do not present a situation where the insurer was delaying litigation solely to

extend the time at which to pay. See *Beach v State Farm Mut Automobile Ins Co*, 216 Mich.App 612, 624; 550 NW2d 580 (1996). Thus, disallowing prejudgment interest was appropriate under the circumstances. *Eley, supra* at 247.

We also conclude that penalty interest is not appropriate in the instant case because defendant State Farm was not dilatory in paying its claim. The purpose of the no-fault act's penalty provision is to penalize insurers for misconduct relating to no-fault claims. *Attard, supra* at 320. Our review of the record reveals that State Farm withheld payments partly to ensure that the State of Michigan and the hospitals received full payment before plaintiff's attorney deducted his fee. Because any delay did not result from defendant State Farm's misconduct, penalty interest was not warranted here.

We affirm.

2001 WL 716795 (Mich.App.)

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